IN THE
SUPREME COURT OF THE UNITED STATES

No. 76-1053

GEORGE R. McCASLIN d/b/a The Tax Man,

Petitioner

versus

H & R BLOCK, INC.,

Respondant

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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Bank Building
Augusta, Georgia 30902
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IN THE SUPREME COURT OF
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CASE NO. _____

GEORGE R. McCASLIN D/B/A THE TAX MAN, Petitioner	PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
VS.	
H & R BLOCK, INC., Respondant	

The petitioner George R. McCaslin d/b/a The Tax Man, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on November 4, 1976.

OPINION BELOW

The opinion of the Court of Appeals is still unreported, but is appended hereto as Exhibit A.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 4, 1976 (A). This petition for writ of certiorari is being presented within ninety days pursuant to U.S.C. 2101(c). This court's jurisdiction is invoked under Title 28 U.S.C. 2101(c).

QUESTIONS PRESENTED

1. Is the rule in Russell v. Farley, 105 U.S. 433, 26 L.ED. 1060, that when an injunction bond is filed by the plaintiff in an injunction case to obtain a preliminary injunction, the district court requiring the bond can, if satisfied that the bond is no longer equitably required, release the bond thereby relieving the plaintiff from any liability to damages, still in effect after the passage of Rule 65(c) of the Federal Rules of Civil Procedure?

2. Where Rule 65(c) of the Federal Rules of Civil Procedure states in mandatory language that the giving of security is an absolute condition precedent to the issuance of a preliminary injunction, does the district court have a discretion to mitigate or nullify that undertaking after the injunction has issued and is later determined to have been improvidently issued?

3. Did the district court, in this case, have the discretion to enter its order, after having found that the temporary restraining order was improperly issued, discharging the plaintiff from liability on its injunction bond in view of the Georgia Law and the evidence before it and without giving the successful defendant opportunity to present evidence on the issue of the plaintiff's good faith?

THE STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Rule 65 of the Federal Rules of Civil Procedure, set forth in Title 28, are:

> "(c) SECURITY. No restraining order of preliminary injunction shall issue except upon the giving of security by the applicant in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. ...."

STATEMENT OF THE CASE

George R. McCaslin d/b/a The Tax Man, petitioner, was the defendant below. H & R Block, Inc., respondant, was the plaintiff below.

In this diversity action, respondant H & R Block, Inc. brought an action in the district court seeking injunctive relief against petitioner George R. McCaslin d/b/a The Tax Man for breach of a covenant not to compete, for five years, in the tax preparation business in the area immediately surrounding Augusta, Georgia. From the beginning, petitioner George R. McCaslin took the position that the covenant against competition was unreasonable, and therefore void and unenforceable. He contended that this covenant not to compete was absolutely void under Georgia law because (1) the five year restriction against competition was for an unreasonable

length of time and (2) was unnecessarily broad in scope.

After an evidentary hearing, the district court on January 29, 1976 disregarded petitioner's contentions and entered its order granting the prayers of respondant H & R Block, Inc. for a preliminary injunction against petitioner George R. McCaslin d/b/a The Tax Man enforcing the covenant pendente lite. The injunction was conditioned upon the posting of a bond in the amount of $50,000.00 by H & R Block, Inc. in accordance with Rule 65(c), Federal Rules of Civil Procedure. The order is appended hereto as Exhibit B. H & R Block, Inc. promptly posted the bond.

On May 13, 1976, the case came on for trial before the court sitting with an advisory jury, pursuant to Rule 39(c), of the Federal Rules of Civil Procedure. At the conclusion of the evidence, argument and charge, the issues were submitted to an advisory jury upon written questions, pursuant to Rule 49(a), of the Federal Rules of Civil Procedure. The jury answered all questions in favor of the defendant petitioner.

Thereafter, on May 21, 1976, the district court entered its final judgment which approved the findings of the jury, which were (1) that five years, as provided for in said covenant not to compete, was an unreasonably long period of time to restrain competition and (2) that the covenant not to compete was unnecessarily

broad in scope, and accordingly denied the prayers of respondant H & R Block, Inc. for a permanent injunction.

Without any further hearing, the district court further in said final judgment held that the case did not present appropriate circumstances for the petitioner, George R. McCaslin d/b/a The Tax Man, to pursue damages on account of the preliminary injunction and discharged the respondant, H & R Block, Inc., and its surety, from their liability on the injunction bond. The final judgment is appended hereto as Exhibit C.

The petitioner promptly filed his notice of appeal to the United States Court of Appeals for the Fifth Circuit from that portion of the final judgment of the district court which discharged the respondant, and its surety, from their liability on the injunction bond. In the appeal, the petitioner argued that the district court was in error because:

A. The covenant not to compete was absolutely void under Georgia Law in that it was unnecessarily broad in scope in prohibiting petitioner from working in any capacity for a competing tax preparation business. He contended that the applicable Georgia Law is so well settled that H & R Block, Inc. could not have had any grounds to reasonably believe that the covenant not to compete was enforceable.

B. The evidence was overwhelming that five years was an unreasonably long period of time to restrain competition and was completely unnecessary for the reasonable, fair and effective protection of H & R Block, Inc. He contended that the evidence was so strong and so overwhelming that H & R Block, Inc. could not have had any ground upon which to reasonably believe that the covenant not to compete was enforceable.

C. The district court made a determination in final judgment that the case did not present appropriate circumstances for the petitioner to pursue damages on account of the preliminary injunction - without any further hearing. He contended that this was not fair, not equity and not warranted by the evidence in the case.

On November 4, 1976 the United States Court of Appeals for the Fifth Circuit affirmed the district court and held, citing Russell v. Farley, 105 U.S. 433, 441-442, 445, 26 L.ED. 1060 (1882), and Page Communications Engineers, Inc. v. Froehlke, 155 U.S. App. D.C. 1, 475 F. 2d 994, 997 (1973), that the awarding of damages pursuant to an injunction bond rests in the sound discretion of the court's equity jurisdiction. The court further held that there could be honest disagreement about whether or not the wording of the covenant prevented petitioner from working "in any capacity" for a competitor. In making this finding, the circuit court used the following language:

"The real question is whether the actual language of the instant provision forbids McCaslin from working 'in any capacity' for a competitor, or instead merely prevents him from entering the tax preparation business. The provision states that the employee shall not 'solicit, accept or in any way establish or engage in any business for the preparation of tax returns ...'"

The complete language of the covenant not to compete is:

"Covenant Against Competition. Employee agrees that at no time will he reveal, directly or indirectly, any confidential business information of the Company without written authorization from the Company. Employee further agrees that during the continuance of this Agreement and for a period of 5 years thereafter he will not, directly or indirectly (whether as owner, employee, agent, stockholder or in any other capacity) solicit, accept or in any way establish or engage in any business for the preparation of tax returns situated or soliciting business within an area of twenty-five (25) miles of the Branch Office without the written permission of the Company."

Finally, in its opinion the circuit court used the following language:

"Though the preliminary injunction effectively prevented operation of McCaslin's business for over a year, it was certainly not an abuse of discretion for the judge to find the suit had been brought in good faith. Further, a consideration of the equities might justifiably have led him to the informal conclusion that a year's prohibition was not unfair in the circumstances presented."

REASONS FOR GRANTING THE WRIT.

1. The judgment of the United States Court of Appeals for the Fifth Circuit:

a. Is in direct conflict with the decision in Atomic Oil Company of Oklahoma, Inc. v. Bardahl Oil Company, C.A. Okl. 1969, 419 F. 2d 1097, certiorari denied 90 S.Ct. 1500, 397 U.S. 1063, 25 L.Ed. 2d 685, decided in the Tenth Circuit, and the decision in Northeast Airlines, Inc. v. Nationwide Charters and Conventions, Inc., 1969, 413 F. 2d 335, decided in the First Circuit.

b. Overlooked the fact that the holding of Russell v. Farley, 105 U.S. 433, 441-442, 445, 26 L. Ed. 1060 (1882), was expressly predicated upon

the absence of an applicable court rule or statute and the later passage of Rule 65(c) nullified the holding in Russell v. Farley by the use of mandatory language.

c. Has decided an important question relating to practice on injunction bonds under federal law which has not been settled by this court since the passage of Rule 65(c) of the Federal Rules of Civil Procedure and which should be settled by this court.

d. Disregards the language of the covenant against competition, the applicable Georgia Law, and the evidence before the trial court in permitting a gross injustice to be perpetrated upon petitioner.

In its decision, the Fifth Circuit blindly followed the decision in Russell v. Farley, 105 U.S. 433, 441-442, 445, 26 L.Ed. 1060 (1882), and cited Page Communications Engineers, Inc. v. Froehlke, 155 U.S. App. D. C. 1, 475 F. 2d 994, 997 (1973), which did the same thing. In so doing, the circuit court disregarded the holding in Atomic Oil Company of Oklahoma, Inc. v. Bardahl Oil Company, C. A. Oko. 1969, 419 F. 2d 1097, certiorari denied 90 S. Ct. 1500, 397 U.S. 1063, 25 L.Ed. 2d 685, decided in the Tenth Circuit, which (pages 1100-1101) points out that the holding in Russell v. Farley was prior to the enactment of the Federal Rules of Civil Procedure and (on page 441 of the opinion) was

expressly predicated upon the absence of an applicable court rule or statute.

Atomic Oil Company of Oklahoma, Inc. v. Bardahl Oil Company, C. A. Oko. 1969, 419 F. 2d 1097, certiorari denied 90 S.Ct. 1500, 397 U.S. 1063, 25 L.Ed. 285, decided in the Tenth Circuit, states on page 1100 the following, which is expressly adopted by petitioner as his argument:

> "The rule set out in Russell v. Farley has been reiterated subsequent to the enactment of the Federal Rules of Civil Procedure, even though the discretion of the trial court to refuse to award damages on an injunction bond in an appropriate case has been largely circumscribed since the existence of Rule 65(c) and its predecessor, 28 U.S.C. §382. Moreover, since the holding of Russell v. Farley was expressly predicated upon the absence of an applicable court rule or statute, the presence of Rule 65(c) would seem to cast great doubt upon the continued viability of the Russell v. Farley rule in cases arising under the Federal Rules of Civil Procedure. The manifest purpose of Rule 65(c), evidenced by its plain language, strongly contraindicates the proposition that the court which issues an injunction should have

the power to foreclose recovery on the injunction bond, when such recovery devolves upon the substantive correctness of the determinations of the very same court. Rule 65(c) states in mandatory language that the giving of security is an absolute condition precedent to the issuance of a preliminary injunction. It imports no discretion to the trial court to mitigate or nullify that undertaking after the injunction has issued. It is obvious that to superimpose such a caveat on the rule would inevitably dilute the otherwise imperative application of the conditions set out in Rule 65(c), and would counteract against the interests meant to be protected by the rule."

Northeast Airlines, Inc. v. Nationwide Charters and Conventions, Inc., 1969 413 F. 2d 335 (First Circuit), 338, reversed the district court's order to release and refund the losing plaintiff's security deposit. In so doing, it referred to the language of Rule 65(c).

The petitioner respectfully submits that in view of the mandatory language of Rule 65(c) of the Federal Rules of Civil Procedure, where a district court thinks well enough of plaintiff's case to grant a preliminary injunction, upon the posting of a bond for the needed protection of the defendant, the district court should not have any

discretion to thereafter nullify the bond. If the district court has any discretion at all, it should be strictly limited to extraordinary and exceptional cases, upon notice to and hearing from the defendant. It is undisputed that the purpose of an injunction bond is to safeguard the defendant from costs and damages incurred as a result of a preliminary injunction improvidently issued. Yakus v. United States, 321 U.S. 414, 440, 64 S.Ct. 660, 674, 88 L. Ed. 834; Northeast Airlines, Inc. v. Nationwide Charters and Conventions, Inc., 413 F.2d 335 (First Circuit 1969); Sylvia Silvers v. TTC Industries, Inc., 484 F.2d 194 (Sixth Circuit 1973); Sylvia Silvers v. TTC Industries, Inc., 395 F.Supp. 1318, affirmed 513 F.2d 632. Rule 65(c).

That portion of the judgment of the district court, which is the basis of this appeal, goes directly against the express language and spirit of Rule 65(c) of the Federal Rules of Civil Procedure.

The circuit court's decision disregarded Georgia Law in its decision. First, whether or not five years is reasonable or unreasonable is a determination made by the Georgia courts under the particular facts and circumstances. Hood v. Legg, 160 Ga. 620(1) (128 S.E. 891); Orkin Exterminating Company, Inc. of South Georgia v. Dewberry, 205 Ga. 794, 807 (51 S.E. 2d 669); Preferred Risk Mutual Insurance Company v. Jones, 233 Ga. 423, 426 (211

S.E. 2d 720); Worley and Associates, Inc. v. Bull, 233 Ga. 276, 278 (210 S.E. 2d 807). Here, the evidence upon the trial of the case was that five years was an unreasonable restriction.

In holding that there could be honest disagreement about whether or not the wording of the covenant prevented petitioner from working "in any capacity" for a competitor, the circuit court disregarded the express language of the covenant and the applicable Georgia cases. In so doing, it considered only a portion of the applicable language in the covenant.

In this case, the covenant against competition contained the following language:

> "Employee further agrees that during the continuance of this agreement and for a period of five years thereafter he will not, directly or indirectly, (whether as owner, EMPLOYEE, agent, stockholder OR IN ANY OTHER CAPACITY) solicit, accept or in any way establish OR ENGAGE IN ANY BUSINESS FOR THE PREPARATION OF TAX RETURNS situated or soliciting business within an area of 25 miles of the branch office without the written permission of the Company." (Emphasis added.)

The operative words are:

> "Employee further agrees that during the continuance of this agreement and for a period of five years thereafter he will not, directly or indirectly, whether as ... EMPLOYEE ... OR IN ANY OTHER CAPACITY ... ENGAGE IN ANY BUSINESS FOR THE PREPARATION OF TAX RETURNS ..." (Emphasis added.)

The above quoted language clearly states that the defendant is absolutely prohibited from working in any capacity for a competitor of H & R Block, Inc., even in positions unrelated to trade secrets or customers. The above quoted language contains no exceptions whatsoever. Under Georgia Law, such language makes the covenant not to compete absolutely void as a matter of law because the Georgia courts hold that such a restriction is unreasonable.

The unreasonableness and illegality of the above quoted language is demonstrated by comparison with similar language held unreasonable and illegal in McNease v. National Motor Club of America, Inc., 238 Ga. 53 (Southeastern citation not yet available); Dunn v. Frank Miller Associates, Inc., 237 Ga. 266, 227 S.E. 2d 243 (1976); Dixie Bearings, Inc. v. Walker, 219 Ga. 353 (133 S.E. 2d 338); Stein Steel and Supply Company v. Tucker, 219 Ga. 844 (136 S.E. 2d 355); and Federated Mutual Insurance Company, et al, v. Whitaker, 232 Ga. 811 (209 S.E. 2d 161). Considering the construction that the

Georgia courts have given similar language, there can be no doubt whatsoever that the wording of the entire language of the covenant prevented petitioner from working "in any capacity" for a competitor.

The Court of Appeals recognized that the preliminary injunction effectively prevented operation of petitioner's business for over a year, but still said there was no abuse of discretion for the district court to have found that the suit had been brought in good faith. For the district court to have made such a finding, there must have been some facts before it upon which to exercise the discretion, if it had any. It is significant that the petitioner has never had his day in court in which to present facts going to the bad faith of the respondant. The issues in the final trial in the district court did not involve the good or bad faith of the respondant or petitioner's damages.

The circuit court finally held that, in referring to the district court, "a consideration of the equities might justifiably have led him to the informal conclusion that a year's prohibition was not unfair in the circumstances presented." Petitioner submits that is the heart of the circuit court's ruling.

The circuit court held "that a year's prohibition was not unfair in the circumstances presented." How can

that be? The covenant against competition was absolutely void! Thus, petitioner was absolutely free under the law to engage in direct head-on competition with the respondant. He was unjustifiably put out of business for over a year by an injunction action brought on a void covenant against competition. Why then can it be said "that a year's prohibition was not unfair in the circumstances presented"? It was unfair - to the petitioner.

If the decisions of the district court and of the circuit court are allowed to stand, what protection did the petitioner have? What protection would any defendant have? It would mean that the mandatory language of Rule 65(c) of the Federal Rules of Civil Procedure means nothing. It would mean that a plaintiff could, with impunity, bring an injunction case secure in the knowledge that if all did not go well, it had lost nothing, regardless of the effect on the defendant.

Petitioner asks for fair play and justice. He should have the opportunity to present evidence to a jury for its determination as to the amount of his damages. He should be permitted to try to get reimbursement for his losses and damages.

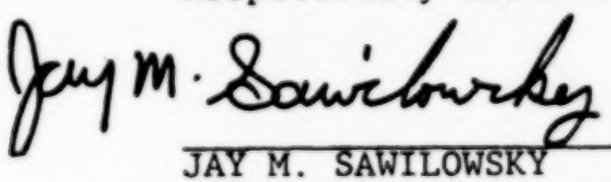
Litigants who bring injunction cases, for the purpose of preventing competition, should be reasonably certain of their position. They should

not be at liberty to take their chances, with the idea - as in this case - that they can put a competitor out of business for over a year, with impunity. It is unreasonable for litigants to expect to be rescued from the consequences of their deliberate actions by a discretion of the district court, not found in the language of Rule 65(c). The United States courts should not be the instruments of such injustice. That was not the intent of Congress as set forth in Rule 65(c).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that I have this day served upon opposing counsel three copies of the within and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit by mailing three copies thereof, postage prepaid, to:

Mr. David E. Hudson
Hull, Towill, Norman, Barrett
& Johnson
Attorneys at Law
P. O. Box 1564
Augusta, Georgia 30903.

This 31st day of January, 1977.

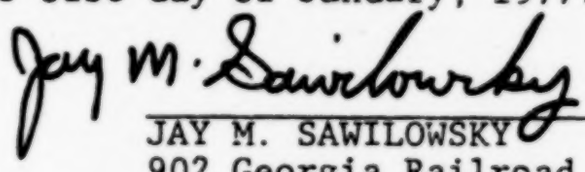

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EXHIBIT A

H & R BLOCK, INC., Plaintiff-Appellee
Cross Appellant,

v.

George R. McCASLIN, d/b/a the Tax
Man, Defendant-Appellant
Cross Appellee.

No. 76-2686

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Nov. 4, 1976.

Appeals from the United States District Court for the Southern District of Georgia.

Before WISDOM, GEE and TJOFLAT, Circuit Judges.

PER CURIAM:

Plaintiff, H & R Block, Inc. (Block), is a Missouri corporation engaged in the tax return preparation business in Georgia and throughout the nation. Before defendant, George McCaslin, came to Augusta, Georgia, to become Block's City Manager for the Augusta area, he signed the contract at issue, which provided, inter alia, that employee McCaslin agreed to refrain for

a period of five years from competing with Block by establishing or engaging in any business for the preparation of tax returns. Block fired McCaslin in 1975, after he refused to accept a new contract, and McCaslin entered the tax return preparation business in the Augusta area, opening one of several offices two doors from Block's main office. McCaslin recruited a number of Block employees, and had access to a Block Policy and Procedure Manual which apparently covers most of the aspects of running a tax return preparation business. Block sued to enjoin McCaslin's business, and after posting a $50,000 bond, obtained a preliminary injunction. At the later hearing, however, the district judge determined, with the aid of an advisory jury, that the covenant against competition was void for two reasons. First, five years was an unreasonably long period of time for a restrictive covenant of that type to run. Second, the covenant was unnecessarily broad in that it prohibited defendant from working in any capacity for a tax preparation business, however minor. The judge also found that Block had sued in good faith, and since there is no liability for damages resulting from a suit for an injunction unless the injunction was obtained maliciously and without probable cause, the judge discharged Block from its liability on the injunction bond. We affirm.

McCaslin appeals from that portion of the judgment which relieved Block and

its surety from their liability on the injunction bond because Block allegedly could not have had any ground to believe that the covenant not to compete was enforceable. Further, McCaslin contends that he deserves reimbursement for damages sustained because of the wrongful issuance of the temporary injunction.

(1,2) McCaslin's assertions fail. The awarding of damages pursuant to an injunction bond rests in the sound discretion of the court's equity jurisdiction. Russell v. Farley, 105 U.S. (15 Otto) 433, 441-42, 445, 26 L.Ed. 1060 (1882); Page Communications Engineers, Inc. v. Froehlke, 155 U.S. App.D.C. 1, 475 F.2d 994, 997 (1973). Numerous extant Georgia cases dealing with covenants not to compete could create a sincere belief that the instant provision was acceptable, as the trial judge himself demonstrated by granting the preliminary injunction and noting that plaintiff had shown it was likely to prevail on the merits. Georgia courts have upheld time limits equivalent to, and even greater than, five years. See, e. g., Shirk v. Loftis Bros. & Co., 148 Ga. 500, 97 S.E. 55 (1918) (four years); Burdine v. Brooks, 206 Ga. 12, 55 S.E.2d 605 (1949) (ten years); Nelson v. Woods, 205 Ga. 295, 53 S.E. 2d 227 (1949) (five years). There seems to be little doubt, and appellant apparently does not contend otherwise, that the territorial prohibition (twenty-five miles from the Block office) is reasonable under Georgia law. See, e. g., Preferred Risk Mutual Ins. Co. v. Jones,

233 Ga. 423, 211 S.E.2d 720 (1970) (twenty-five miles); Spalding v. Southeastern Personnel, 222 Ga. 339, 149 S.E.2d 794 (1966) (thirty miles); Ogle v. Wright, 187 Ga. 749, 2 S.E.2d 72 (1939) (fifty miles). Finally, there can be honest disagreement about whether or not the wording of the covenant prevents McCaslin from working "in any capacity" for a competitor. Block does not deny, though McCaslin implies otherwise, that Georgia law holds unreasonable an employment contract which prohibits the employee, upon leaving such employment, from obtaining employment with a competitor in any capacity (for example, janitor, bookkeeper). Dunn v. Frank Miller Associates, Inc., 237 Ga. 266, 227 S.E.2d 243 (1976); Dixie Bearings, Inc. v. Walker, 219 Ga. 353, 133 S.E.2d 338 (1963). The real question is whether the actual language of the instant provision forbids McCaslin from working "in any capacity" for a competitor, or instead merely prevents him from entering the tax preparation business. The provision states that the employee shall not "solicit, accept or in any way establish or engage in any business for the preparation of tax returns . . . ." Even the district judge had difficulty interpreting this language, for he completely reversed his initial determination, found in the preliminary injunction order, that this was not a blanket prohibition against working in any capacity for a competing tax return preparation business. No less can we expect that Block might also have been unsure about the actual

effect of the words, though it bears some responsibility for adopting them. Though the preliminary injunction effectively prevented operation of McCaslin's business for over a year, it was certainly not an abuse of discretion for the judge to find the suit had been brought in good faith. Further, a consideration of the equities might justifiably have led him to the informal conclusion that a year's prohibition was not unfair in the circumstances presented.

(3) Block appeals from that portion of the judgment holding the covenant not to compete void, and denying a five-year permanent injunction. Aided by the findings of an advisory jury, the trial judge found the covenant unreasonable. That decision is not clearly erroneous.

AFFIRMED.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

H & R BLOCK, INC.,	*	CIVIL ACTION
Plaintiff	*	NO. 176-4
vs.	*	
GEORGE McCASLIN, d/b/a The Tax Man,	*	
Defendant	*	

O R D E R

This cause comes before the Court on the application of plaintiff, H & R Block, Inc., for a preliminary injunction enforcing against defendant, George McCaslin, a covenant not to compete in the tax preparation business in the Augusta, Georgia area.

After a hearing held in Brunswick, Georgia, on January 16, 1976, the Court took the application for a preliminary injunction under advisement. The parties have, as requested, submitted proposed findings of fact and conclusions of law.

Upon consideration, the Court concludes that the preliminary injunction must be granted pending a final hearing on the permanent injunction. In arriving at this conclusion, the Court makes the following findings of fact and conclucions of law:

Findings of Fact

Jurisdiction is based on the diversity of citizenship provisions of 28 U.S.C. §1332. The requisites for the exercise of diversity jurisdiction appear to be satisfied, and no issue has been raised as to the propriety of this Court's exercising jurisdiction.

Plaintiff, H & R Block, Inc. (Block), is a Missouri corporation engaged chiefly in the sale of its services as tax consultants and preparers of tax returns. Block does an extensive business in Georgia and has been doing business in the Augusta area for at least ten years. At the end of 1975, H & R Block, Inc., had five company-run offices in Augusta and two in the adjoining county in South Carolina. These offices were administered by the Augusta City Manager. In addition, several "satellite" offices were being run in outlying counties with some oversight from the main Augusta office. These satellites, however, are in the nature of franchises.

Defendant, George McCaslin, is a resident of South Carolina who came to Augusta in 1967 specifically to assume the duties of City Manager for the Augusta branch offices of H & R Block, Inc. At that time he signed the contract at issue in this case. That contract contained the following covenant:

"8. Covenant Against Competition. Employee agrees

that at no time will he reveal, directly or indirectly, any confidential business information of the company without written authorization from the Company. Employee further agrees that during the continuance of this Agreement and for a period of 5 years thereafter he will not, directly or indirectly, (whether as owner, employee, agent, stockholder or in any other capacity) solicit, accept or in any way establish or engage in any business for the preparation of tax returns situated or soliciting business within an area of twenty-five (25) miles of the Branch Office without the written permission of the Company. Recognizing that because of his access to confidential business information and his substantial training and experience with the Company, irreparable injury to the Company would be caused by his violation of any provision of this paragraph, employee agrees that in addition to and without limitation of any right the Company may have hereunder, any such violation shall be the proper subject matter for immediate injunctive relief."

At some point during 1975, plaintiff, H & R Block, Inc., determined that a revision of the employment contracts offered to individuals holding defendant's position was necessary. As a result, a new contract was drafted which would undoubtedly have reduced defendant's

annual income during 1976. This effect would have resulted from an alteration in the basis on which compensation was computed. Under the new contract, compensation over and above fixed salary would be computed on the basis of increase in business as well as profits. The announced purpose of this change was to increase business by boosting the incentive of area managers such as defendant to attract new business.

Defendant McCaslin, in about the spring of 1975, became aware of the proposed terms of the new contract. At that time he began to consider entering the tax preparation business on his own, and consulted with several employees of H & R Block about these plans.

When the new contract was offered to defendant, he refused to accept it, and in August of 1975 was terminated by H & R Block. He performed no further duties after that time even though he was to be paid under his old contract through December, 1975.

In January of 1976, defendant began engaging in the tax preparation business in the Augusta area. He has established offices at four locations. One location is two doors from H & R Block's main office in Augusta. Another is in the Mitchell Shopping Center in Aiken, South Carolina, where another Block office is located. Defendant has also opened two offices in J. M. Fields, Inc. stores, following the practice

originated by H & R Block of locating offices in department stores.

In setting up his business, defendant has recruited and hired a number of former H & R Block employees for the upcoming tax "season," most of whom were solicited or consulted prior to the termination of defendant's employment with Block. Defendant has also adopted the same schedule of fees used by H & R Block during the past tax season.

Tax preparation is a seasonal business requiring seasonal employees to prepare returns. The evidence shows that former customers of H & R Block have returned to Block seeking the services of tax preparers who have now been hired by defendant. The evidence also shows that of the five returns prepared by defendant's new business as of January 16, 1976, two of those were former customers of H & R Block.

The training and experience which defendant received through Block training programs and from running the Augusta branch were valuable. While with Block he was given access to a Policy and Procedures Manual which apparently covers in some detail most of the important aspects of running a tax preparation business. Defendant understandably has drawn extensively on the knowledge and experience he acquired with Block and is running his new business in substantially the same manner as he ran the H & R Block offices.

Conclusions of Law

A preliminary injunction should not issue unless a showing is made that plaintiff is likely to prevail at trial on the merits. Canal Authority v. Callaway, 489 F.2d 567, 572 (5th Cir. 1974). See generally 7 Moore's Federal Practice ¶ 65.04(1) at 65-39 (2d ed. 1975). On the facts in this case it appears clear that defendant is competing with plaintiff in violation of the terms of his contract. Thus, the likelihood of plaintiff's success turns on whether or not the covenant not to compete contained in Mr. McCaslin's employment contract was valid and enforceable.

This issue can be reduced further to whether or not the covenant in question was

> "reasonable as to time and place . . . not overly broad as to the activities proscribed, taking into consideration the interests of individuals in gaining and pursuing a livelihood, of commercial concerns in protecting property, confidential information and relationships, good will and economic advantage, and of the broader public policy favoring individual freedom to enter into contracts and to contract as one will." Durham v. Stand-By Labor, 230 Ga. 558, 560 (1973).

Considering first the requirement that the time limitation be reasonable,

that requirement appears to be met. While the bulk of the reported cases involve one or two year covenants, e.g., Preferred Risk Mutual Insurance Company v. Jones, 233 Ga. 423 (1975); Edwin K. Williams & Company - East v. Padgett, 226 Ga. 613 (1970); Baxley v. Black, 224 Ga. 456 (1968), covenants restricting competition for longer periods have also been upheld. See Mansfield v. B. & W. Gas, Inc., 222 Ga. 259 (1966); Shirk v. Loftis Brothers & Company, 148 Ga. 505 (1918). The Court concludes that the Georgia courts would not find this five-year restriction unreasonable.

As for the requirement that the activity be reasonably restricted as to place, it appears that this covenant would not be invalidated on that ground. Defendant is prohibited from soliciting, accepting or in any way establishing or engaging in any business for the preparation of tax returns "situated or soliciting business within an area of twenty-five (25) miles of the Branch Office . . . ." The Branch Office is defined in the contract as "the company's Branch Office(s) located in Augusta, Georgia (the 'Branch Office')." Thus, the area of prohibition extends outward twenty-five miles from a point or points located in or near the City of Augusta and prohibits his employment in such a business outside as well as inside that twenty-five miles if the business solicits clients within that area. This restriction is not unreasonable. See Preferred Risk Mutual Insurance Company v. Jones, 233 Ga. 423 (1975);

Spalding v. Southeastern Personnel, 222 Ga. 339, 340 (1966).

Defendant's primary attack on this covenant deals with the third requirement -- that the activity which is prohibited be reasonably restricted so as not to infringe unnecessarily on the employee's right to pursue a livelihood. Along this line, defendant argues that the covenant in this case is unenforceable because vague and indefinite

> "as to the nature, kind and character of activity the employee would not engage in and is unreasonable because of the absolute prohibition of the employee's working in any capacity for a competitor in a position unrelated to trade secrets or customers." Stein Steel & Supply Company v. Tucker, 219 Ga. 844, 846 (1964). See also Dixie Bearings, Inc. v. Walker, 219 Ga. 353 (1963).

He contends that he would be prohibited from working in any capacity in the tax preparation business, even, for example, as a janitor. This being true, he argues, the covenant must be held unreasonable under Stein Steel & Supply Company, supra, and Dixie Bearings, Inc., supra.

This contention cannot be accepted. Under the clause in question in this case, the employee agrees that he will not "solicit, accept or in any way establish or engage in any business for

the preparation of tax returns . . . ." All of the proscribed activities -- soliciting, accepting, establishing, and engaging in a tax preparation business -- are activities which this Court holds may be reasonably prohibited. In short, the prohibitions are not unreasonable because they are closely related to the protection of customers and to protection of Block from competition based on knowledge and familiarity with the manner and methods of operation of the company. See Water Services, Inc. v. Tesco Chemicals, Inc., 410 F.2d 163 (5th Cir. 1969); Baxley v. Black, 224 Ga. 456 (1968).

Even if the covenant is construed as prohibiting defendant from performing any function in a tax preparation office, the covenant on these facts would be nontheless reasonable. This case is distinguishable from the Stein Steel & Supply Company and Dixie Bearings, Inc. cases. In those cases the nature of the businesses involved was different. There, the employing companies were involved in the production and sales of hardware. A blanket prohibition there, on those facts, was much broader in practical effect than is the case here, where the business is involved in the sale of services. The Court holds that Stein Steel & Supply Company, supra, and Dixie Bearings, Inc., should be construed and confined to their respective facts. See Water Services, Inc. v. Tesco Chemicals, Inc., supra at 168-70.

In sum, the Court must conclude

that plaintiff has met the requirement of showing likelihood of success on the merits. This requirement having been met, the Court must next determine whether the balance of convenience dictates that the preliminary injunction issue.

In considering this question, the Court must weigh the threatened harm to the plaintiff against the harm the injunction may do to the defendant. Canal Authority v. Callaway, 489 F.2d 567 (5th Cir. 1974).

> "There is no absolute standard by which the discretion of a trial judge is to be guided in determining whether to grant or deny a motion for a temporary or preliminary injunction. His task is to balance the relative conveniences of the parties. If he finds that certain, immediate, and irreparable injury to a substantial interest of the movant will occur if the application is denied and the final decree is in his favor, and that injury to the opponent will be inconsiderable or may be adequately indemnified by a bond, even if the final decree be in his favor, an injunction should issue." Calagaz v. DeFries, 303 F.2d 588, 589-90 (5th Cir. 1962). See also City of Miami Beach v. Benhow Realty, Inc., 168 F.2d 378, 379 (5th Cir. 1948).

In this case, considering that defendant will be protected by a

substantial bond in an amount exceeding defendant's annual income for 1975, the balance tips in favor of granting the injunction.

Finally, the Court notes that the public interest will not be disserved by the grant of a preliminary injunction in this case. An employer has a legitimate interest in protecting itself, within reason, against a former employee's using his training, expertise, and knowledge of customers against his former employer. And further, enforcement in this case will support the "broader public policy favoring individual freedom to enter into contracts and to contract as one will." Durham v. Stand-By Labor, supra at 560.

Accordingly, it is

ORDERED that defendant, George McCaslin (whether as owner, employee, agent, stockholder, or in any other capacity) is hereby enjoined from soliciting or accepting any business for the preparation of tax returns within an area of twenty-five (25) miles of plaintiff's offices located in Augusta, Georgia.

ORDERED FURTHER that defendant, George McCaslin, (whether as owner, employee, agent, stockholder, or in any other capacity) is hereby enjoined from establishing or engaging in any business for the preparation of tax returns situated or soliciting business within an area of twenty-five (25) miles

of plaintiff's offices located in Augusta, Georgia.

The foregoing injunction is contingent upon the plaintiff's first giving bond in the sum of Fifty Thousand Dollars ($50,000) for the payment of such costs and damages as may be incurred or suffered by defendant should he be found to have been wrongfully enjoined.

This 29th day of January, 1976.

s/ Anthony A. Alaimo
United States District
Judge

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

H & R BLOCK, INC., * CIVIL ACTION

Plaintiff * NO. 176-4

VS. *

GEORGE R. McCASLIN, *
d/b/a The Tax Man,
*

Defendant

FINDINGS AND CONCLUSIONS

In this diversity action, plaintiff seeks injunctive relief against defendant for breach of a covenant not to compete in the tax preparation business in the area immediately surrounding Augusta, Georgia. After an evidentiary hearing on January 16, 1976, this Court granted plaintiff's prayer for a preliminary injunction enforcing the covenant pendente lite.

Defendant has challenged plaintiff's right to recover on various grounds. First, he contends that the Court has no jurisdiction pursuant to 28 U.S.C. § 1332 because it appears to a certainty that the jurisdictional amount is not involved. Next, he argues that the restrictive covenant is void as a matter of law and fact because it is unreasonable as to time.

Finally, he argues that the covenant is otherwise unreasonable and an illegal restraint of trade because its restrictions are not only unnecessary for a fair protection of plaintiff's business, but also overly restrictive in the scope of activities prohibited.

On May 13, 1976, the case came on for trial before the Court sitting with an advisory jury, pursuant to Rule 39(c), Fed. R. Civ. P. At the conclusion of the evidence, argument and charge, the issues were submitted to the advisory jury upon written questions, pursuant to Rule 49(a), Fed. R. Civ. P. The import of the answers was uniformly in favor of the defendant. The questions and answers are as follows:

"1. Do you find that upon the termination of his employment with H & R Block that defendant would have a competitive impact detrimental to H & R Block if defendant were to engage in a competing tax preparation business?

No
Answer "Yes" or "No"

"2. Would plaintiff have been damaged at least $10,000 or more if the defendant had remained in a competitive business for a period of five years?

No
Answer "Yes" or "No"

"3. Under all of the facts and circumstances of this case, was the five-year restriction against competition by defendant reasonable; that is to say, do you find that defendant's ability to have a meaningful competitive impact detrimental to the interest of H & R Block by engaging in a competing tax preparation business would continue for a period of time up to five years?

No
Answer "Yes" or "No"

"4. Under all the facts and circumstances of this case, was the covenant against competition by defendant in this contract otherwise reasonable as to the activity prohibited?

No
Answer "Yes" or "No"

So say we all, this 14th day of May, 1976."

In 1967, plaintiff employed defendant as the city manager of the former's office in the Augusta, Georgia area. The employment was evidenced by a formal contract containing the following covenant:

"8. Covenant Against Competition. Employee agrees that at no time will he reveal, directly or indirectly, any confidential

business information of the company without written authorization from the Company. Employee further agrees that during the continuance of this Agreement and for a period of 5 years thereafter he will not, directly or indirectly, (whether as owner, employee, agent, stockholder or in any other capacity) solicit, accept or in any way establish or engage in any business for the preparation of tax returns situated for soliciting business within an area of twenty-five (25) miles of the Branch Office without the written permission of the Company. Recognizing that because of his access to confidential business information and his substantial training and experience with the Company, irreparable injury to the Company would be caused by his violation of any provision of this paragraph, employee agrees that in addition to and without limitation of any right the Company may have hereunder, any such violation shall be the proper subject matter for immediate injunctive relief."

The employment was terminated as of December 31, 1975, when defendant refused to sign a superseding employment contract. In January, 1976, defendant opened a competing tax preparation business in Augusta, establishing four offices in close proximity to plaintiff's offices, staffing them by proselyting plaintiff's employees.

Addressing the jurisdictional challenge, the Court finds that the jurisdictional bases are well pleaded, and that it does not factually appear to a legal certainty that the claim is for less than the jurisdictional amount. E.g., Burns v. Anderson, 502 F.2d 970 (5th Cir. 1974). Ordinarily, in actions seeking injunctive relief, the amount in controversy is measured by the value to the plaintiff of the right he is seeking to protect, even though the value of that right may not be capable of exact valuation in money. Premier Industrial Corp. v. Texas Industrial Fastener Co., 450 F.2d 444, 446 (5th Cir. 1971). See also 1 J. Moore, Federal Practice, ¶ 0.96(2) at 925 (2d ed. 1975). Indeed, it was likely that plaintiff, over a period of five years' competition, stood to lose well in excess of $10,000. "(P)laintiff need not show to an absolute certainty that the jurisdictional amount is satisfied; a present probability is sufficient." 1 J. Moore, Op. Cit., ¶ 0.92(3.-1) at 871. Accordingly, the Court finds it has jurisdiction pursuant to 28 U.S.C. §1332, and any inconsistent finding by the jury in the answer to question numbered 2 is disapproved.

The remaining findings of the jury are approved. Five years was an unreasonably long period of time to restrain competition. Such a lengthy restriction was totally unnecessary to protect plaintiff's business. Orkin Exterminating Company, Inc. of South Georgia v. Dewberry, 204 Ga. 794 (1949);

Purcell v. Joyner, 231 Ga. 85 (1973); Durham v. Stand-by Labor of Ga., Inc., 230 Ga. 558 (1973). Moreover, the covenant not to compete was unnecessarily broad in scope in prohibiting defendant from working in any capacity for a tax preparation business, whether or not his activities had any competitive effect on plaintiff's business. Such "over-kill" renders the covenant void. Dixie Bearings, Inc. v. Walker, 219 Ga. 353 (1963); Stein Steel & Supply Company v. Tucker, 219 Ga. 844 (1964); Federated Mutual Insurance Company, et al. v. Whitaker, 232 Ga. 811 (1974).

Accordingly, plaintiff's prayers for a permanent injunction must be denied.

The Court deems it appropriate and necessary to make additional findings regarding any exposure or liability on plaintiff's bond. By Order of January 29, 1976, defendant was preliminarily enjoined from competition with the plaintiff. The Court's injunction was conditioned upon the posting of a bond in the amount of $50,000 by plaintiff in accordance with Rule 65(c), Fed. R. Civ. P. Upon consideration of the evidence adduced at the preliminary injunction hearing, and also upon the trial of this case, the Court finds that the institution of this action by plaintiff and plaintiff's presentation of evidence by which the preliminary injunction was issued was in good faith and based upon a reasonable expectation that plaintiff would prevail

upon the merits of the case. Final disposition of the case was pursued by the Court and both parties without undue delay and without the concealment of pertinent facts needed for a determination of the cause.

Accordingly, this case does not present appropriate circumstances for the defendant to pursue damages on account of the preliminary injunction from which it will now be relieved. The awarding of damages pursuant to an injunction bond is a matter resting in the sound discretion of the court. Russell v. Farley, 105 U.S. 433, 26 L.Ed. 1060 (1882). Moreover, there is no liability for damages resulting from a suit for an injunction or an injunction erroneously granted unless the suit was brought and the injunction obtained maliciously and without probable cause. Greenwood County v. Duke Power Company, 107 F.2d 484 (4th Cir. 1939), cert. denied 309 U.S. 667 (1940); 7 J. Moore, Federal Practice, ¶ 65.10(1), n. 9. Plaintiff and plaintiff's surety are, therefore, discharged from their liability on the injunction bond.

The Clerk is directed to enter a judgment dismissing the complaint at plaintiff's costs.

So ordered, this 21st day of May, 1976.

s/ Anthony A. Alaimo
United States District Judge

In The
Supreme Court Of The United States

No. 76-1053

GEORGE R. McCASLIN,
d/b/a THE TAX MAN,

Petitioner

vs.

H & R BLOCK, INC.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The District Court issued two opinions. The first was a lengthy order and opinion of January 29, 1976, granting a preliminary injunction. This opinion is reproduced as Exhibit B to the petition. The final order and opinion of the District Court was issued on May 21, 1976, and is attached as Exhibit C to the petition. The opinion of the Court of Appeals for the Fifth Circuit (Exhibit A to the petition) is reported at 541 F.2d 1098.

QUESTIONS PRESENTED

1. Does the district court have discretion, upon finding that a lawsuit was instituted and a preliminary injunction obtained in good faith, without malice, and upon probable cause, to discharge the injunction bond and deny an action for

damages to the party that was preliminarily enjoined.

2. Whether this Court should grant a writ of certiorari to determine the circumstances under which an action for damages may be maintained against an injunction bond when the party who would prosecute such an action would not, in any event, be entitled to damages.

3. Whether this Court should grant a writ of certiorari to consider whether an action may be maintained on an injunction bond when the underlying issues of state law in a diversity case were improperly decided.

STATEMENT OF THE CASE

This appeal is the progeny of an action instituted by H & R Block to enforce a non-compete clause against a former city manager of the H & R Block business in Augusta, Georgia. The suit was filed on January 8, 1976 (A.1)[1], and on January 9, 1976, H & R Block moved for a temporary restraining order or in the alternative for a preliminary injunction (A.10). A hearing on the motion was held on January 9, 1976, and the district court ordered an evidentiary hearing for January 16, 1976 (A.36).

A full evidentiary hearing was held on January 16 (A.90-175) and both parties submitted proposed findings and conclusions to the court. On January 29, 1976, the trial court entered its order and opinion (A.67-75) granting a preliminary injunction prohibiting competition by the former manager (McCaslin) effective upon the filing of a bond by H & R Block. A $50,000 bond was filed on February 2, 1976, and the injunction went into effect (A.76).

[1]"A" references are to the printed appendix on appeal to the United States Court of Appeals for the Fifth Circuit.

On May 13, 1976, the matter came on for trial before the court with an advisory jury. (A.184). Notwithstanding the findings of the trial court in its initial order of January 29, 1976, the advisory jury answered special interrogatories in favor of allowing McCaslin to compete (A.184). In specific, the jury found that $10,000 was not in dispute, that Mr. McCaslin would not have done $10,000 damage to H & R Block over a five-year period, that Mr. McCaslin would have no competitive impact for a time up to five years, and that the non-compete clause was otherwise unreasonable (A.181.-182).

The district court accepted all the findings of the advisory jury except as to jurisdictional amount (A. 185-186), and entered an order and opinion in conformity therewith. In addition, the court found that H & R Block and its surety should be discharged on their bond as the case did not present sufficient circumstances for a damage action even though the preliminary injunction was dissolved (A. 183-188).

Following the entry of judgment on the trial court's order, McCaslin filed a notice of appeal asserting that it was error for the trial court to discharge H & R Block and its surety on the bond (A. 190). H & R Block cross-appealed contending that it was error for the court to deny a permanent injunction (A. 198).

On appeal, it was held by the Fifth Circuit that awarding of damages pursuant to an injunction bond is within the discretion of the district court and that the record sufficiently supported the decision of the district court in denying damages in this case. On the cross-appeal of H & R Block going to the merits of the covenant against competition, the court of appeals acknowledged that two aspects of the covenant fell within the permissible restrictions

of the Georgia cases. As to the third and final aspect of the covenant, the court of appeals reached no independent conclusion while acknowledging the difficulty encountered by the district court. The matter was resolved by the court of appeal's finding that the district court's decision was not clearly erroneous.

STATEMENT OF UNDISPUTED FACTS

H & R Block is a nationally known company involved in the preparation of income tax returns. H & R Block has been in business since 1954 and has 7,000 offices across the country (A. 345-346). It has seven locations in Augusta and some 60 employees, all of which are under the direction and control of a city manager (A. 143).

Mr. McCaslin was the Augusta manager for H & R Block for ten years until his employment was terminated at the end of 1975 (A. 202). Prior to coming to Augusta, he was an income tax preparer for H & R Block. Mr. McCaslin has worked most of his adult life for H & R Block (A. 203-04) and "most of his experience has been with H & R Block (A. 234)." While city manager in Augusta, Mr. McCaslin signed a contract with H & R Block in 1967 that contained the following covenant against competition (A. 204):

> 8. **Covenant Against Competition.** Employee agrees that at no time will he reveal, directly or indirectly, any confidential business information of the Company without written authorization from the Company. Employee further agrees that during the continuance of this Agreement and for a period of 5 years thereafter he will not, directly or indirectly, (whether as owner, employee, agent, stockholder or in any other capacity) solicit, accept or in any way establish or engage in any business for the preparation of tax returns situated or soliciting business within an area of twenty-five (25) miles of the Branch Office without the written permission of the Company. Recognizing that because of his access to confidential business information and his substantial training and experience with the Company, irreparable injury to the Company would be caused by his violation of any provision of this paragraph, employee agrees that in addition to and without limitation of any right the Company may have hereunder, any such violation shall be the proper subject matter for immediate injunctive relief. (A. 412).

Beginning in early 1975, Mr. McCaslin became aware that H & R Block was requiring its city managers to sign a contract with a different compensation formula than had been used in previous years (A. 312). At that time Mr. McCaslin began discussing with other H & R Block employees that he might open his own tax preparation business (A. 100). Finally in August, Mr. McCaslin refused to work under the new contract and he was terminated (A. 312).[2]

On January 4, 1976, Mr. McCaslin opened his own tax preparation business in Augusta (A. 314). Mr. McCaslin admits that this business was in direct competition with H & R Block and in violation of the terms of the non-compete clause (A. 204). He neither received nor requested permission, written or oral, from H & R Block to engage in such competition (A. 249-50).

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[2]The dispute detween H & R Block and Mr. McCaslin was over compensation. The Augusta H & R Block operation would have had to increase its business from year to year for the manager to have earned as much as in the past (A. 121). However, the circumstances of termination have no bearing on the enforceability of non-compete clauses. *Ogle v. Wright*, 187 Ga. 749, 2 S.E.2d 73 (1939).

Not only did Mr. McCaslin start a competing business, he did so directly at the expense of his former employer. Mr. McCaslin set up four locations. One location was on the main business street in Augusta, **two-doors** down from the principal H & R Block office (A. 224, 140). Another location was in the same shopping center as a H & R Block office and McCaslin knew that the shopping center location he chose was better than that which H & R Block had (A. 140, 225-26). The other two locations were set up in discount department stores very close to other H & R Block offices (A. 140). Moreover, Mr. McCaslin based his use of department stores as office sites on his experience in using Sears and Roebuck stores in Augusta for H & R Block (A. 226).

Perhaps more damaging was the manner in which Mr. McCaslin staffed his offices. All nine employees hired by him were former H & R Block employees whose experience and ability were known to Mr. McCaslin because of his past employment with H & R Block (A. 216, 223-24). Seven had been working for H & R Block until hired by Mr. McCaslin (A. 216). One of these seven was an office manager for H & R Block (A. 216). Certain of these employees had worked for H & R Block in Augusta for as many as **three, four, seven** and **ten** years (A. 23).

These employees had produced approximately $50,000 or 22% of the gross income for H & R Block in Augusta in 1975 (A. 238 260). H & R Block expected that they would return for work in 1976 but they did not when they were hired by Mr. McCaslin (A. 305, 334). After these employees left H & R Block, they were often requested by customers who went elsewhere upon learning that these preparers were no longer employed (A. 334). H & R Block was able to retain some six other employees who were solicited by Mr. McCaslin (A. 218-19). H & R Block suffered substantial difficulty in staffing its offices when these employees departed (A. 333).

In the operation of his new business until the injunction went into effect, Mr. McCaslin followed a pattern of doing things just as he has been trained to do them while he was employed by H & R Block. When asked at the preliminary hearing, Mr. McCaslin stated that his business was substantially different only in the types of office equipment used (A. 110-11; also A. 229). Mr. McCaslin offered to compensate his new employees on a "30/10" basis, i.e., 30% of the fee plus an extra 10% for business solicited by the employees (A. 104-05). Mr. McCaslin made a point of telling them that the 10% extra would apply to former customers of H & R Block (A. 104).

In operating his business, Mr. McCaslin based his charges to customers and payments to employees on what H & R Block had done (A. 228). Mr. McCaslin advertised the fact that he had been in the business for ten years in the CSRA[3] (A. 230, 415). He advertised the identical guarantee that H & R Block uses (A. 230-31, 420). Mr. McCaslin admitted that he wanted to take away H & R Block customers (A. 222).

ARGUMENT

THE DISTRICT COURT HAS DISCRETION TO ALLOW OR DISALLOW AN ACTION FOR DAMAGES ON AN INJUNCTION BOND.

The benchmark decision in this area of the law is **Russell v. Farley,** 105 U.S. 433 (1881) where the Supreme Court held that an action on an injunction bond is discretionary with the trial court.

Since the discretion of imposing terms upon a party, as a condition of granting or withhold-

[3]"Central Savannah River Area", i.e., Augusta.

ing an injunction, is an inherit power of the court, exercised for the purpose of effecting justice between the parties, it would seem to follow that, in the absence of an imperative statute to the contrary, the court should have the power to mitigate the terms imposed, or to relieve from them altogether . . . . Besides, the power to impose a condition implies the power to relieve from it. . . .

On general principles, the same reason applies where. . . a party is required to give bond to answer the damage which the adverse party may sustain by the action of the court. In the course of the cause, or at the final hearing, it may manifestly appear that such an extraordinary security ought not to be retained as the basis of further litigation between the parties; that the suit has been fairly and honestly pursued or defended by the party who was required to enter into the undertaking, and that it would be inequitable to subject him to any other liability than that which the law imposes in ordinary cases. . . .

That damages were sustained is very probable. Such a litigation as this would hardly fail to result in damage to all the parties engaged in it . . . . The question before the court or at least that which it undertook to determine, was whether, under the circumstances of the case, any damages at all ought to be recovered....On this point, the judgment of the court approaches so near to an exercise of discretion, that we should require a very clear case to be made in order to induce us to reverse it. 26 L.Ed. 1063-65.

Some years later, in a case not altogether different in principle from that presently before the Court, the issue arose in **Greenwood County v. Duke Power Company,** 107 F.2d 484 (4 Cir. 1939), **cert. denied,** 309 U.S. 667 (1940). In that case a commercial power company obtained a preliminary injunction which halted the receipt of funds by a county government from the U.S. Public Works Administration which funds would have been used to construct a power plant. The injunction stayed in effect for some three years before it was finally determined, after several hearings and appeals, that the power company would not prevail. Thereupon, the county government brought suit on the injunction bond attempting to recover the amount of profits which it alleged would have been earned had the power plant been constructed.

The district court dismissed the suit by the county government and the dismissal was affirmed by the Fourth Circuit. In its opinion, the Fourth Circuit emphasized that there was no allegation that the power company had acted "maliciously or without probable cause." In its affirming opinion, the court included the following:

> It must be remembered, in this connection, that the awarding of damages under such a bond is not a matter of right, but one resting in the sound discretion of the court. (citation to **Russell v. Farley**) . . . The position of plaintiff was taken in good faith on the question of law as to which there was a wide divergence of opinion. There was no unnecessary delay, but on the contrary the case was expedited and heard as rapidly as possible. 107 F.2d at 489.

In arguing that the district court erred in discharging Block and its surety, petitioner is in effect asking for a **per se** rule; that is, if the injunction is dissolved, the party who was enjoined automatically has an action for its damages. However, the cases cited by petitioner are not viable authority

in support of this position and only **Atomic Oil Co. v. Bardahl Oil Co.,** 419 F.2d 1097 (10 Cir. 1969) attempts to distinguish the rule of **Russell v. Farley.** In **Atomic Oil,** the Tenth Circuit states that **Russell v. Farley** may be distinguished because the opinion pre-dated the enactment of Rule 65 (c), FRCP. Reference is made to the fact that the conclusion in **Russell v. Farley** is preceded with an acknowledgement by the Court that "no Act of Congress, or rule of this Court, has ever been passed or adopted on this subject." 26 L.Ed. at 1063. Yet after making this comparison, the Tenth Circuit did not go so far as to announce a contrary rule. It based its decision to allow an action on the injunction bond on the fact that the trial court had "taken no action with respect to the liability established by the bond." This is to be contrasted with the situation in **Russell v. Farley,** and in the present case, where both courts found that the litigation had been pursued "fairly and honestly" and that the circumstances did not demand any liability other than that "which the law imposes in ordinary cases." 26 L.Ed. at 1063.[4]

The most careful attention given to the present issue since the enactment of the Federal Rules of Civil Procedure is in **Page Communications Engineers, Inc. V. Froelke,** 475 F.2d 994 (D.C. Cir. 1973). In this case an unsuccessful bidder on a Department of Defense contract obtained a preliminary injunction which prevented for a time the awarding of the contract. When the injunction was later dissolved, the government counterclaimed for damages on the injunction bond which had been posted by the plaintiff.

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[4]The other case cited by petitioner in support of its position is *Northeast Airlines, Inc. v. Nationwide Charters and Conventions, Inc.,* 413 F.2d 335 (1 Cir. 69) which simply does not discuss the power of the district court to either allow or disallow a suit on an injunction bond.

The district court dismissed the counterclaim by the government and the Court of Appeals affirmed. Both courts found that plaintiff's action was "not frivolous" and that it presented "solid questions". The Court of Appeals then stated the following analysis of bond recoveries vis-a-vis Rule 65 (c):

> Although Rule 65 (c) required a bond here, it does not follow that the district court was bound to award damages on the bond, without considering the equities of the case. The Rule did not make judgment on the bond automatic, upon a showing of damage. On the contrary, the court in considering the matter of damages was exercising its equity powers, and was bound to effect justice between the parties, avoiding any result that would be inequitable or oppressive for either party. The Rule was not intended to negate the court's duty in this regard. Thus, we hold that the court had discretion to refuse to award damages, in the interest of equity and justice. This conclusion is consistant with the provision of the Rule which gives the court discretion to fix bond in a nominal amount; clearly the rule does not contemplate that a defendant who is wrongfully enjoined will always be made whole by recovery of damages. 475 F.2d at 997.[5]

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[5]Additional weight for the proposition that the enactment of Rule 65 (c) did not change the rule of "discretion" is found in the Rules Committee Note of 1946 reprinted at 7 *Moore's,* §65.01[8]. In the note the committee acknowledged the holding of *Russell V. Farley* but did not indicate in any way that the import of this case was changed by Rule 65 (c). The committee simply wanted to make clear that an action on the bond, if appropriate, could be brought in the same proceeding as the original action.

In the event that this Court is inclined to re-evaluate the present law on the trial court's "discretion" to decide whether an action may be maintained on an injunction bond, any such reexamination would not redound to be benefit of the present petitioner. While the enactment of Rule 65 (c) might arguably be a basis for limiting discretion, it is clearly established that an action on an appeal bond will not lie under circumstances such as those extant in the present case. This is plainly stated in Professor Moore's treatise:

> It is well settled that there is no liability for damages resulting from suit for an injunction or from a restraining order or injunction erroneously granted, unless the suit was prosecuted maliciously and without probable cause....[6]

The reason for such a rule is well stated in **United Motors Service v. Tropic-Aire,** 57 F.2d 479, 483 (8 Cir. 1932).

> The philosophy of the matter is that an error in granting an injunction is an error of the court, for which there is no recovery in damages unless the same is sufficiently intentional as to be the basis for a suit for malicious prosecution, otherwise the damage is **damnum absque injuria.**

Upon reflection, it would be peculiar if the rule were otherwise. On appeal, the district court's decision to grant or deny an injunction is reviewed under a standard of "discretion". **Doran v. Salem Inn, Inc.,** 422 U.S. 922, 932, 45 L.Ed.2d 648 (1975). In addition, it has been held that the district court has discretion in the appropriate case to altogether forgo the requirement that security be posted. **Scherr v. Volpe,** 466 F.2d 1027, 1035 (7 Cir. 1972);

[6] *7 Moore's Federal Practice,* §65.10[1], p. 65-98

Continental Oil Co. v. Frontier Refining Co., 338 F.2d 780, 782, (10 Cir. 1964). Under such circumstances, unless the reviewing court is willing to conclude that the grant of an injunction was an abuse of a discretion by the district court and that the party who sought the injunction contributed in some wrongful way to its issuance, liability should not be created for the good faith use of a legal process in which the district court concurred.

Nowhere else in the law is there a situation where a party is exposed to a penalty for having honestly and forthrightly pursued a remedy afforded by law when there was probable cause to believe that the remedy should be granted. Assume, for example, that the injunction had been granted in the trial court as a part of a final order after a trial on the merits as opposed to a preliminary injunction after an evidentiary hearing. In the hypothetical situation where the injunction is imposed after a trial on the merits, there is no requirement that the prevailing party post bond even though the litigation may continue on appeal. To the contrary, it is the party that has been enjoined that must obtain a stay of the trial court's order. Rule 8, FRAP.

Thus, a bond is required when an injunction is obtained in a preliminary stage of the proceedings and is not required if the injunction is entered after a trial on the merits. The obvious reason for this distinction is that an injunction obtained at a preliminary proceeding runs the risk of having been procured without probable cause or a sound basis in fact and law. But when the district court thereafter hears the evidence at the trial on the merits, and compares it to what the plaintiff presented at the preliminary proceeding, the court can determine whether the plaintiff acted in good faith and with probable cause.

This view is consistent with the notion expressed in **Russell v. Farley** that the trial court should be able to leave the parties with the liabilities which they would face in "ordinary cases". 26 L.Ed. at 1063. Moreover, a literal reading of the word "wrongful" in Rule 65 (c), FRCP, would require the party enjoined to show more than that the injunction was subsequently lifted or its imposition reversed by higher courts. If the latter were intended, the Rule would have stated that the bond is security for damages sustained as a result of an injunction which is later dissolved or reversed. Instead, "wrongful" is the predicate used in the Rule and respondent submits that this term has a definite and substantive meaning.

Under the law of Georgia, there is no cause of action for another's wrongful use of a legal process, whether that process be in equity or in law, without a showing that the process was used or invoked with malice or without probable cause. **Georgia Loan & Trust Co. v. Johnson,** 116 Ga. 628 (1905); **Mitchell v. The Southwestern Railroad,** 75 Ga. 398 (1885); **Chamberlain Co. of America v. Mays,** 96 Ga. App. 755, 759, 101 S.E.2d 728 (1957); and **Spires v. Spires,** 30 Ga. App. 228, 229; 17 S.E. 255 (1923). If Rule 65 (c) was intended to mean that an action for damages will lie in every instance where an injunction is lifted or its imposition reversed, such a meaning could have been clearly expressed. As the Rule is now worded, "wrongful" must connotate something more than an honest, open, and well-founded attempt to obtain the benefits of a legal remedy.

THE DISTRICT COURT CORRECTLY EXERCISED ITS DISCRETION AND/OR FOUND THE PETITIONER TO HAVE ACTED WITH GOOD FAITH AND PROBABLE CAUSE.

It must be remembered that the preliminary

injunction was granted by the district court after an extensive evidentiary hearing on January 16, 1976. (A. 90-176). Also at that time the district court had the benefit of numerous affidavits and exhibits which had been submitted by the parties. (A. 27, 37, 43). After considering this evidence for nearly two weeks, the district court then issued a well-reasoned and detailed nine-page order upholding the validity of the covenant against competition and imposing a preliminary injunction against the former employee.

Some four months later, a trial on the merits was conducted with the same witnesses and the same evidence except that the defendant presented the opinion testimony of four additional witnesses who stated that in their opinion a five-year covenant against competition was not needed.[7] The matter was tried before an advisory jury which answered special verdict questions so as to allow competition by the former employee against his former corporate, employer. The trial court adopted the findings of the advisory jury (except as to jurisdiction) and in one paragraph reversed its view as to the validity of the covenant. (A. 186-187).[8]

H & R Block submits that there is no serious challenge to the validity of the findings by the trial

[7]The evidence remained without conflict, however, that the former employee would have the ability to compete to the disadvantage of Block even after five years. Respondent admitted as much. (A. 234).

[8]This Court may well be puzzled at this reversal by the district court. The explanation is that the only leverage which the trial judge could exert over the plaintiff for purposes of settlement after having granted the preliminary injunction was the prospect of having to re-try the issues of fact before a jury. When the case was not settled, the trial court conducted the jury trial and adopted the verdict of the advisory jury. The trial court tempered this about-face with its ruling that an action would not lie on the injunction bond.

court that H & R Block acted in good faith and on a reasonable expectation that it would prevail on the merits of the case. Nor is there any serious challenge by petitioner to the finding by the trial court that the case was pursued and disposed of "without undue delay and without concealment of pertinent facts needed for a determination of the cause." (A. 187). These findings by the trial court must be sustained under the clearly erroneous rule. **United States v. United States Gypsum Co.,** 333 U.S. 364, 394-395 (1948).

In view of these unchallenged findings of the district court, it must be deemed as conclusive for purposes of the present petition that H & R Block acted in good faith, with probable cause, and without undue delay. In addition, there is the very close question of whether H & R Block is entitled to prevail on the merits of the covenant not to compete.[9] There is also the unique factual background from which the present case arose. One party or the other was going to be disadvantaged for a time because of the trial court's ruling on the motion for a preliminary injunction; there was no middle ground. The risk of harm to the parties was no greater in enjoining Mr. McCaslin from competing than it would have been had the court allowed his competing business to continue **pendente lite** with an equally onerous disadvantage to the former employer. In such circumstances, when the law and facts appear to afford relief to the former employer, it seems much more reasonable to enjoin the business which has not yet become established than to run the greater risk of error in allowing an established enterprise to be damaged by unlawful competition.

In sum, there are numerous considerations which justify the actions of H & R Block and the

[9]A point that will be discussed in more detail in a succeeding section of this brief.

decision of the trial court. Whether this court considers an action on an injunction bond to be governed by "discretion" or by the absence or presence **vel non** of good faith, probable cause, etc., an action for damages would be inappropriate against H & R Block.

CERTIORARI IS INAPPROPRIATE IN ANY EVENT BECAUSE PETITIONER HAS NO SUSTAINABLE CLAIM FOR DAMAGES

In addition to the foregoing argument, there is another reason why the district court's decision was correct and why certiorari would be inappropriate here. Any damages which Mr. McCaslin might have asserted would have been too remote or speculative to be recovered under the Georgia law.

> As a general rule the expected profits of a commercial business are too uncertain, speculative, and remote, to permit a recovery for their loss. However, the loss of profits from the destruction or interruption of an **established** business may be recovered if the amount of actual loss is rendered reasonably certain by competent proof, but in all such cases it must be made to appear that the business which is claimed to have been interrupted was an established one, that it had been successfully conducted for such a length of time, and had such a trade established, that the profits thereof are reasonably ascertainable. **Atlanta Gas Light Company v. Newman,** 88 Ga. App. 252, 253, 76 S.E.2d 536 (1953). (Emphasis added).

In the present case, Mr. McCaslin's business was not established until January 4, 1976, and the business was shortly thereafter enjoined by the district court's order of January 29, 1976. Mr. McCaslin's enterprise had no history of profits or earnings (A. 313). While it was found by the trial

court that Mr. McCaslin's competition would damage H & R Block, (A. 186), three of Mr. McCaslin's own witnesses testified that there was no certainty that McCaslin would make a profit (A. 265, 275-76, 279-80). In fact the injunction may well have saved Mr. McCaslin from investing more money in a losing enterprise. Mr. McCaslin himself testified that "he didn't have any idea" of the volume of business he would have done during the tax season while he was enjoined by the order of the district court. (A. 236-237, 238).

It is plain now and it was plain to the district court that the exact standard of proof for lost profits could not have been satisfied by Mr. McCaslin and this is yet another reason supportive of the decision of the district court not to allow an action for damages on the injunction bond.

CERTIORARI IS INAPPROPRIATE BECAUSE THE UNDERLYING ISSUES OF STATE LAW HAVE HERETOFORE BEEN INCORRECTLY DECIDED IN FAVOR OF PETITIONER.

The validity of covenants against competition in employer/employee contracts under Georgia law requires a three-prong analysis and is to be determined by courts as a matter of law from the face of the contract. The three-part test is well stated in **Coffee System of Atlanta v. Fox,** 226 Ga. 593, 176 S.E.2d 71 (1970):

> An examination of the decided cases on restrictive covenants reveals that this court has customarily considered three separate elements of such contracts in determining whether they are reasonable or not. These three elements, may be characterized as (1) the restraint on the activity of the employee, or former employee, imposed by the contract; (2) the territorial or

> geographic restraints; and (3) the length of time during which the covenant seeks to impose the restraint. It has been said that no better test can be applied to the question of whether a restrictive covenant is reasonable or not than by considering whether the restraint "is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interest of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and if oppressive, it is in the eye of the law unreasonable.
>
> There can be no doubt that an agreement that during the term of the service, and for a reasonable time period thereafter, the employee shall not become interested in or engage in a rival business, is reasonable and valid, the contract being otherwise legal and not in general restraint of trade. This is the rule followed by a majority of the American courts and is supported by reason." 226 Ga. 595.

The recent case of **Landmark Financial Services, Inc., v. Tarpley,** 236 Ga. 568, 244 S.E.2d 736 (1976) illustrates how these matters are decided as questions of law by the courts based on a comparison of the restraints in a contract with restraints previously approved by the Georgia appellate courts. In fact the court has recently stated as follows:

> The reasonableness of the restraint is a question of law to be determined by the court. **Edwards v. Howe Richardson Scale Co.,** 237 Ga. 818, 229 S.E.2d 651, 652 (1976).

The only exception would be where the evidence shows that the former employee is being restrained in an area where his former employer did not compete or is being restrained from an activity which

would not be competitively disadvantageous to the employer.[10]

As to the first of the three tests in Georgia--the time length of the restriction--the district court first found (A. 71) as did the Court of Appeals, 541 F.2d at 1099, that five years was permissable in view of the Georgia precedents. In fact, only once in all of the Georgia decisions has a covenant been invalidated because of time. In the case of **Rakestraw v. Lanier,** 104 Ga. 188 (1898) a covenant was invalidated because it contained **no** time restriction at all.

In regard to the second of the three tests--that of the territorial restriction--the Court of Appeals correctly determined that there was no doubt that this aspect of the covenant was valid. 541 F.2d at 1099. There could have been no other conclusion as Mr. McCaslin himself admitted that the Augusta offices of H & R Block compete for and solicit business up to a 25 mile radius from Augusta. (A. 234-36).

The third and last factor to be considered is the reasonableness of the restraint. Petitioner has throughout this litigation attacked the restraint as overly broad, contending that the language is so open-ended that it would prevent petitioner from working in some innocuous and non-competitive position with another company. Petitioner has stressed that the words "in any capacity" must be construed to mean that he cannot work as a janitor, bookkeeper, or truck driver for a competitor. The trial court disagreed with this interpretation and found that all of the activities proscribed in the

[10]*E.g., Dixie Bearings Inc. v. Walker,* 219 Ga. 353, 133 S.E.2d 338 (1963) where the activities restrained included those which would not be anti-competitive, and *Purcell v. Joyner,* 231 Ga. 85, 200 S.E.2d 363 (1973), where the former employee only worked in eight of the seventeen counties where the restriction applied.

covenant--soliciting, accepting, establishing, and engaging in, tax preparation--were activities which could be prohibited. (A. 72). The Court of Appeals acknowledged that this was a difficult question and side-stepped the issue by concluding that the trial judge's findings were not clearly erroneous.[11]

While the covenant in the present case does use the words "in any other capacity", these words do not state that the former employee may not work in any capacity for a competitor. The words as used in this covenant plainly mean that the employee may not, in any capacity, do any one of four things--solicit, accept, establish or engage in the tax preparation business. As found by the trial court, each of these activities has the potential to be anti-competitive in a way which would not be true for a janitor, truck driver, etc.

Petitioner has tried to avoid this interpretation of the covenant by arguing that the prohibition against "engaging" in any business is so broad as to prohibit employment in an innocuous capacity.[12] In any event, his argument must now be laid to rest for certain with the decision on October 26, 1976, in **Edwards v. Howe Richardson Scales Co.,** 237 Ga.

[11]The clearly erroneous standard is one which applies to determinations of fact. H & R Block submits that the interpretation of the terms in the contract was a question of law which should have been set aside if erroneous to any extent.

[12]Most importantly, this Court should not overlook the fact that Mr. McCaslin was not competing as a mere messenger, clerk, or custodian. He was the owner of a chain of four offices which he set up on the very doorsteps of his former employer. His training and experience with H & R Block went into every facet of the tax preparation business and he admitted that he drew upon his ten years with H & R Block in selecting sites, placing his advertisements, hiring his employees and operating every aspect of his business.

818, 229 S.E.2d 651 (1976) where the court sustained a covenant which would not allow a former employee with extensive responsibilities in the former employer's business "to engage" in a competing business.[13]

The district court correctly analyzed all of these issues in its first and most thorough opinion. An about-face became necessary when the case was allowed to go so far as an advisory jury verdict against the employer. While it is not necessary for this Court to try and remedy this error of law by the lower courts, it is important that this Court not set in motion the process of certiorari where the petitioner, as here, was not entitled to the lower court decision on the merits, much less a right of action on the injunction bond.

CONCLUSION

The district court attempted to bring this litigation to an end by lifting the preliminary injunction and at the same time discharging H & R Block from any liability in having obtained the injunction. The court of appeals affirmed this decision. As this Court will determine from its own evaluation of the validity of the restrictive covenants, as well as from the district court's first and most painstaking opinion (A. 67), H & R Block had very sound reasons for attempting to enforce the covenant. The district

[13]The reason that the word "engage" is allowed by the Georgia cases to describe activities that may be lawfully prohibited is that this term means something more than being a messenger boy, janitor, etc. *See, Webster's Seventh New Collegiate Dictionary:* "Engage--to begin and carry on an enterprise."

Edwards, supra, should be compared with *McNease v. National Motor Club,* 238 Ga. 53, 56, 231 S.E.2d 58 (1976) where the court held that it was unreasonable to prohibit an employee from any engagement in a competing business where the employee had only limited responsibilities with the former employer.

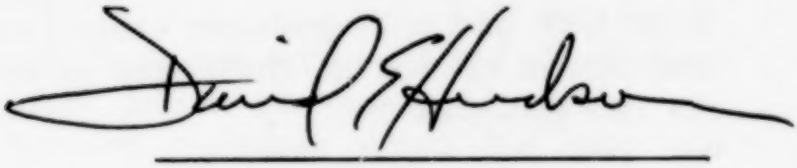
court monitored the entire proceedings and had the opportunity to compare what was presented at the preliminary injunction hearing with what was presented at the trial on the merits. The district court's conclusions that H & R Block proceeded in good faith and with probable cause have not been, and indeed cannot be, challenged as erroneous and for very good reason.

It is submitted that whether this Court continues to follow the rule of **Russell v. Farley,** 105 U.S. 433 (1881), or decides that it will reevaluate the discretion of the district court in the light of the adoption of Rule 65(c), this is an inappropriate case for such an undertaking. For whether this case is reviewed as one involving the district court's discretion or whether the case must turn on the absence or presence of good faith and probable cause on the part of H & R Block, petitioner would not in either event be entitled to relief on the injunction bond.

Finally, it is hard to imagine a factual situation which would demonstrate more graphically than the present record, a former employee attempting to capitalize on what he had obtained from his former employer than does the present case. In locating his offices, hiring his personnel, and in running his business, petitioner appropriated techniques, experience, and confidential information of his former employer. H & R Block attempted to protect itself with a non-compete clause, no part of which has ever been proscribed as inappropriate or unlawful by any decision of the Georgia courts. Moreover, each aspect of the non-compete clause clearly conforms to prior decisions of the Georgia Supreme Court.

For the foregoing reasons, respondent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,



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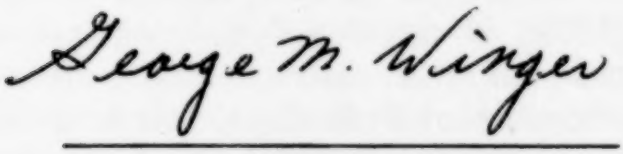


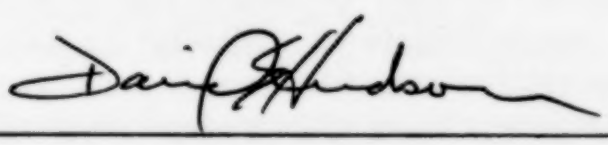
George M. Winger

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing Respondent's Brief in Opposition upon Mr. Jay M. Sawilowsky, 902 Georgia Railroad Bank Building Augusta, Georgia 30902, by placing same in the United States mail properly addressed and posted.

This 3 day of March, 1977.



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